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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission
DOCKETED
MAR 1 8 2002
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IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH § 271 OF THE TELECOMMUNICATIONS ACT OF 1996

Docket No. T-00000A-97-0238

QWEST'S OPPOSITION TO AT&T'S MOTION TO REQUIRE QWEST TO SUPPLEMENT THE RECORD

Qwest Corporation ("Qwest") hereby files its opposition to the motion by AT&T Communications of the Mountain States, Inc. and TCG Phoenix (collectively, "AT&T") for an order requiring Qwest to supplement the record.

AT&T's Motion should be denied. AT&T has not presented any reason why a newly-filed complaint filed against Qwest in Minnesota – one that Qwest vigorously disputes – should delay completion of Section 271 proceedings here in Arizona. That complaint raises specific objections to specific decisions by Qwest and CLECs pursuant to Section 252 of the Telecommunications Act. The complaint second-guesses line drawing as to which Qwest-CLEC agreements must be filed with and approved by the Minnesota PUC before they take effect, and which do not. As discussed below, Qwest is strongly challenging the Minnesota complaint. It believes that it complied with all of its obligations under Section 252. But in any event, that matter does not present any grounds for delaying completion of this docket reviewing Qwest's

qualifications under Section 272. AT&T's delaying tactics should be rejected, and its motion denied.

Moreover, AT&T's motion has been mooted by Qwest's submission to the Arizona Corporation Commission (the "Commission") of those agreements with CLECs that relate to Arizona (the "Arizona Agreements"). Qwest has submitted certain of the Arizona Agreements publicly because it has obtained the consent of the contracting CLECs to do so. Qwest has filed the remainder of the Arizona Agreements under seal where it has not, as yet, obtained the contracting CLECs' consent.

I. AT&T HAS NOT PROVIDED ANY GROUNDS FOR DELAYING COMPLETION OF THIS PROCEEDING

In a five-page motion, AT&T asks the Commission to require Qwest "to file as exhibits in this proceeding, all agreements made by Qwest since the effective date of the [Telecommunications Act of 1996], in non-redacted form, whether currently in effect or terminated for whatever reason, that are related to the provision of interconnection, services and network elements in the State of Arizona under section 251 of the Act." AT&T's Motion refers, in a misleading fashion, to a complaint filed by the Minnesota Department of Commerce (the "Minnesota DOC") with the Minnesota Public Utilities Commission (the "Minnesota Complaint" or "Complaint") on February 14, 2002. In that Complaint, the Minnesota DOC points to portions of eleven agreements between Qwest and CLECs that the Minnesota DOC alleges should have been filed with and approved by the Minnesota Public Utilities Commission (the "Minnesota PUC").

As discussed in more detail below, Qwest believes that the Minnesota DOC is misreading the requirements of Section 252. At the least, the Minnesota Complaint raises novel and important legal issues regarding the breadth of Section 252.

For the present purposes, however, the most relevant point is that the new Minnesota Complaint provides no grounds for AT&T's request to supplement the record in this Section 271 proceeding. The Commission is nearing the end of a review process that has extended literally over years. AT&T has an obvious self-interest in delaying completion of this proceeding, which will bring the benefits of real long distance competition to Arizona consumers. It is now obvious to any participant in or observer of the 271 process that AT&T will try to latch on to any item, no matter how groundless or remote, in an attempt to delay the inevitable. But a bare allegation, in another State, where proceedings are just beginning, is not a reason to clog this proceeding with further filings.[1]/

Furthermore, Qwest has mooted AT&T's motion by submitting the Arizona Agreements to the Commission for it to review. This submission permits the Commission to evaluate for itself those agreements at issue in the Minnesota Complaint,

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[1]/ Raymond Gifford, the Chair of Public Utilities Commission of the State of Colorado ("Colorado PUC"), recently rejected a similar attempt by AT&T to import Minnesota conduct into the Colorado Section 271 proceeding. In his capacity as Hearing Examiner, Chairman Gifford found that such allegations are not relevant to his determination that Qwest's provision of long distance services would be in the public interest. He found that the allegations presented did not dictate denial of Qwest's 271 application:

> This issue highlights the heightened expectations that parties have in a public interest inquiry to sling as much as they can on the wall to see what will stick. Not only have I dealt with alleged instances of anticompetitive conduct throughout this docket, several of which have unmercifully reappeared here, but I have repeatedly questioned why region-wide anecdotes and accusations are not being levied in a more appropriate forum, such as traditional state commission complaint proceedings or the courts. . . .
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> . . . . Allow me to reiterate: this is not a catch-all inquiry. The public interest test is prospective in nature, and the record is simply devoid of any "pattern" of anticompetitive behavior in Colorado that is foreseeable to take place in the future or implicate welfare enhancement.

See, In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996, Order on Staff Volume VII regarding Compliance with Section 272, the Public Interest, and Track A, Docket No. 97I-198T, at 44 (March 15, 2002) (footnote omitted).

as well as other agreements that touch upon this State. If the Commission has other questions, it can ask them of Qwest. But the place to do so is not in this docket.

In short, whatever one makes of the Minnesota Complaint, it does not form a basis for extending Section 271 proceedings before this Commission. If the Commission were to grant AT&T's motion, it would simply encourage the company to look for other excuses to "supplement the 271 record" and delay action here. AT&T's Motion should therefore be denied.

II. THE MINNESOTA COMPLAINT RAISES COMPLEX ISSUES THAT DO NOT BELONG IN THIS 271 PROCEEDING

AT&T's Motion does not make clear the central issue posed by the Minnesota Complaint: Which ILEC-CLEC agreements constitute interconnection agreements that must be filed with the Commission under the Telecommunications Act, and which do not. This is not an obvious matter, and Qwest takes strong exception to AT&T's mischaracterization of our contracts with CLECs and its pejorative implications of "secret agreements." [2]/ The Minnesota DOC itself acknowledges that not all ILEC-CLEC agreements must be subjected to the regulatory processes of public filing and State

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[2]/ Indeed, AT&T's position is the height of irony, as it has vigorously defended its own right to define what types of agreements must be filed under the Act. As an AT&T lawyer stated in a hearing before the Minnesota Public Utilities Commission, AT&T had the sole authority to determine that a settlement did not need to be filed with the Commission:

> Mr. Bradley: . . . Staff notes that there's been past payments under the existing DMOQs and asks why we didn't bring that information into the record. We didn't bring that information into the record because each of those were settled. We would file a claim. Qwest would come back with telling us what they thought the actual amounts were. We would agree on the actual amounts, and then we'd enter into settlement, which precludes us from including that specific information of specific facts into the record. *We weren't required to file those under state or federal law because they were not an interpretation or an amendment to the contract.*

In the Matter of Qwest Wholesale Service Quality Standards, PUC DOCKET NO: P-421/M-00-849, Hearing before the MPUC February 5, 2002, Transcript of Hearing, p. 28 (Emphasis added).

Commission review before taking effect. In this case the dispute is one of line-drawing: Qwest believes that the Minnesota DOC is reading Section 252 too broadly, and hence seeking to bring matters under the regulatory scope of Section 252 filing and pre-approval processes that Congress rather intended to leave to be worked out among carriers on their own.

To support its motion, AT&T offers a series of misstatements and half-truths. For example, AT&T misconstrues Qwest's Answer to the Minnesota Complaint. AT&T states that "Qwest answered the Complaint, arguing that 1) the scope of section 252 filing requirements exceeds the Minnesota Commission's jurisdiction; and 2) if the agreements should have been filed with the Commission under section 252 and were not, the agreements are void and unenforceable." In fact, Qwest's Answer, which Qwest provided to the Commission on March 11, 2002, provides a detailed rebuttal to each allegation offered in the Minnesota Complaint in addition to the legal and jurisdictional arguments that it raised.

Even the lone example that AT&T provides in its motion is misdescribed. AT&T quotes one of the six Eschelon Telecom, Inc. ("Eschelon") agreements that sets out a method for calculating local usage charges.[3]/ AT&T fails to mention that this method is identical to that used for calculating local usage charges for all CLECs. Moreover, while AT&T states that Qwest redacted the attachment as a trade secret in its initial filing, Qwest provided an unredacted

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[3]/ The term of the agreement quoted by AT&T in its motion states as follows:

> 3.1 The Parties have agreed that Qwest will calculate local usage charges associated with Unbundled Network Element Platform ("UNE-P") switching on Eschelon's interLATA and intraLATA toll traffic, and Eschelon will pay undisputed amounts within 30 days from Eschelon's receipt of the monthly invoice from Qwest. (See Attachment 3.2, ¶III(B) of the Interconnection Agreement Amendment Terms, Nov. 15, 2000). Qwest will calculate local usage charges in accordance with the procedures set forth on Attachment 3 to this Implementation Plan

QWEST/ESCHELON IMPLEMENTATION PLAN signed July 31, 2001.

version of the complete attachment to this Commission and the Minnesota Commission.

More generally, AT&T's derivative reliance on the Minnesota Complaint disregards the nature of the provisions at issue there. The Minnesota Complaint alleged that Qwest was required by sections 251 and 252 of the Act to file and obtain the Minnesota Commission's approval of four categories of provisions contained in agreements between Qwest and certain CLECs.

The first category of provisions defined business-to-business administrative procedures at a granular level. Among others, the Minnesota Complaint challenged Qwest's decision not to file extremely detailed business process terms, including CLEC-specific escalation procedures for dispute resolution or actions to address CLEC-specific business issues. In these particular provisions, Qwest agreed to participate in meetings and similar administrative processes to review business questions and concerns as part of an effort to tailor its implementation processes to meet the varying needs of its CLEC customers. In its Answer, Qwest demonstrated that the Act did not require Qwest to spell out this level of detail in an interconnection agreement filed with and approved by the Minnesota Commission (or its counterpart in another State).

The second category of provisions challenged in the Minnesota Complaint related to agreements settling historical disputes, *i.e.*, provisions of agreements that settled ongoing disputes or litigation between the parties. These disputes typically related to differences between Qwest and a CLEC over their respective past performance under an Interconnection Agreement or to billing disputes. The provisions at issue memorialized settlements Qwest and the CLEC were able to reach without troubling the Minnesota Commission or any other body. In its Answer, Qwest demonstrated that Section 252 of

the Act does not require Qwest to file and seek approval as interconnection agreements of settlement provisions like these, a position that AT&T presumably agrees with because it has vociferously objected to having its own settlement agreements filed with State commissions.

The third category related to agreements on matters falling outside the scope of Sections 251 and 252. For example, the Minnesota Complaint cites one provision dealing with the carrier access rates that the CLEC charged Qwest for terminating Qwest's intraLATA toll service. In another instance, the Minnesota Department challenged Qwest's decision not to file a provision under which Qwest bought non-telecommunications services from a CLEC.

Finally, in at least one instance, the Minnesota Complaint raises provisions where Qwest is simply stating that it will comply with the Minnesota Commission's orders pending further proceedings.

AT&T, based again solely on the Minnesota Complaint, concludes generally that Qwest unlawfully discriminated against other CLECs when it entered into these agreements with some CLECs and did not file them with or seek approval from the Minnesota Commission. In reality, Qwest has provided all CLECs, in Arizona and elsewhere, with the same basic rates, terms and conditions of interconnection, as required by Section 251. In Qwest's view, AT&T has distorted the scope of the Act in suggesting that variations in business-to-business administrative processes constitute unlawful discrimination.

Qwest has met its obligations under Section 251 on a materially equal basis, leaving room for the inevitable differences among its wholesale customers with respect to

administrative process. Similarly, as AT&T surely must agree based on its own past positions, Qwest does not violate Section 251's non-discrimination provisions when it settles disputes with CLECs on terms satisfactory to them, allowing the CLEC and Qwest to avoid the uncertainties and delays of litigation. Nor does Qwest violate Section 251 when it enters into agreements on matters that do not concern that statute.

In addition to the legal deficiencies in AT&T's position, AT&T fails altogether to articulate the economic or non-economic harms supposedly suffered by CLECs or other parties as a result of Qwest's decision not to file or seek approval of the challenged provisions. AT&T merely states that "every term or condition related to the provision of interconnection, services or network elements has an economic cost to a carrier, whether positive or negative." Even if that were true, the point is not whether agreements between ILECs and CLECs have an economic impact, but whether such agreements are within the Act's filing requirements.

The Minnesota Complaint presents important – and novel – issues of law for Arizona and all other States. An overbroad reading of Section 252 means that ILECs and CLECs would have to file many agreements between them for which the Telecommunications Act did not actually intend to require State approval. Such a result would unnecessarily burden all utilities commissions with added time-consuming review proceedings, and delay the point when such agreements could take effect. Such micro-regulation is the antithesis of the Act's intent.

Second, an overbroad interpretation of Section 252 would be contrary to the Telecommunications Act's goal of encouraging ILECs and CLECs to work out their arrangements through private negotiations – subject only to the specific minimum pre-

approval requirements for those contract provisions that are truly within the scope of Sections 251 and 252.

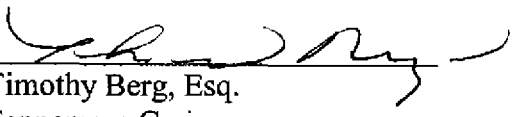
Qwest takes its obligations under the Act very seriously. We are always willing to enter into good faith negotiations with CLECs on business issues of interest and concern to them, and to negotiate with and accommodate the concerns of the full range of its wholesale customers, large and small. Like most businesses, CLECs – including AT&T – often prefer to keep business terms confidential, and Qwest respects the proprietary information of its customers. The Telecommunications Act sets limits on normal business confidentiality; core terms of interconnection must be filed and approved. But an overbroad reading of Section 252 would interfere with the incentives and ability of parties to reach agreement in areas outside the actual scope of the Act.

III. CONCLUSION

For the foregoing reasons, AT&T has manifestly failed to demonstrate that either the merits of its argument or the public interest weighs in favor of its motion to supplement the record. The mere filing of a complaint in Minnesota related to the proper interpretation of Section 252 is not a ground for extending this Section 271 review proceeding through additional record activity. This is all the more so given the complex and novel legal issues raised by the Minnesota Complaint. Qwest respectfully requests that the Commission deny AT&T's motion.

Respectfully submitted this 18th day of March 2002.

QWEST CORPORATION



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